

LIABILITY FOR COMPULSORY PILOTS
—
**AN ANALYSIS OF RECENT CHANGES IN
SOUTH AFRICAN STATUTORY LAW**

by

Kim Woggon (WGGKIM001)

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In fulfillment of the requirements for the degree LLM in Commercial Law

(by approved courses & a minor dissertation)

Faculty of Law

UNIVERSITY OF CAPE TOWN

Date of submission: 15 February 2009

Supervisor: Graham Bradfield, Department of Commercial Law, University of
Cape Town

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION OF PLAGIARISM

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the footnote convention for citation and referencing. Each contribution to, and quotation in, this dissertation from the work(s) of other people has been attributed, and has been cited and referenced.
3. This dissertation is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.
5. I acknowledge that copying someone else's assignment or essay, or part of it, is wrong, and I declare that this is my own work

Signature: Student No: WGGKIM001

Date: 15. Februar 9

CONTENT

I. Introduction

1. Focus of the paper
2. Facts & figures of shipping
3. Pilotage

(a) Pilot

(b) Compulsory and voluntary pilotage

(c) Providing pilotage services

II. Historical background & applicable law in South Africa

1. Historical background
2. Applicable law

III. Responsibility & liability

1. Description of current South African law
2. Common law

a) Vicarious liability

b) Liability for voluntary and compulsory pilots

3. English law

a) Section 15 of the 1913 Pilotage Act / section 35 of the 1983 Pilotage Act

b) Section 2 and 16 of the 1987 Pilotage Act

c) Concluding remarks on English law

4. Australian law

a) *Fowles Appellant v Eastern and Australian Steamship Company Ltd*

b) *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* and section 410B of the Navigation Act 1912

5. Evaluation of South African law

- a) Section 10(7) of Schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989
- b) Liability for compulsory pilots until the coming into effect of the National Ports Act 2005
- c) National Ports Act 2005

aa) Section 76(1): 'good faith'

bb) Section 76(2): master – servant relationship / strict liability

d) Reasoning behind changes in legislation

aa) Explicit liability on part of the shipowner as remedy for harbour authority and third parties

bb) In the business of piloting ships

cc) Concurrent liability on part of the shipowner, pilot and harbour authority

IV. Final remarks

Bibliography

I. Introduction

And I dismiss, absolve, and discharge you and each of you as being unworthy, unfit, unskilful, inexperienced, lazy, negligent and careless men from the charge, care, and practice of conducting, commanding, and piloting any ships whatsoever as well from any ports whatsoever within this famous realm of England as to ports over the seas.¹

These are the words of *Anthony Husse*, the President of the Admiralty Court in *Re Rumney and Wood* in the year 1541, judging over marine pilots who had caused damages while piloting a vessel. This passage shows how important marine pilots were and how crucial their work must have been even back then in order to have such harsh judgement made about their misconduct of a vessel.

1. Focus of this paper

The work of marine pilots has always been of great importance mainly due to the high-value vessels of which they are in charge. Yet, if the pilot causes damages while being in charge of the navigation of a vessel, there is little use of suing him for indemnity since he will, most likely, have very limited assets providing for sufficient funds for possible high costs resulting from the damages.² Consequently, the law traditionally held shipowners vicariously liable for the acts and omissions of the pilots who they are said to employ while the pilot himself and a possible general employer like a harbour authority were absolved from liability.³

A vessel nowadays might cost between a few million and several hundred million dollars and the cargo of such a vessel may double those figures regarding the size of the modern vessels.⁴ Furthermore, the often highly toxic cargo might cause major environmental damage when leaking into the sea, or cause loss of high value property and/or life and lead to consequential loss due to harbour closure.⁵ Hence, the importance of pilotage services has increased within the years. Yet, the law seems to

¹ *Anthony Husse*, President of the Admiralty Court in *Re Rumney and Wood* (1541), English translation in *Select pleas in the court of admiralty, A.D. 1390-1404 and A.D. 1527-1545*, Vol. 1, Selden Society, at 213ff.

² Ambrose Rajadurai 'Vicarious liability for negligent pilotage in Victoria' (2002) 16 *ANZMLJ* 39, at 45.

³ See discussion further down.

⁴ Rajadurai (n 2) at 39.

⁵ Rajadurai (n 2), at 40.

have not evolved much in the direction towards being prepared to fully satisfy the demands of safety of navigation.

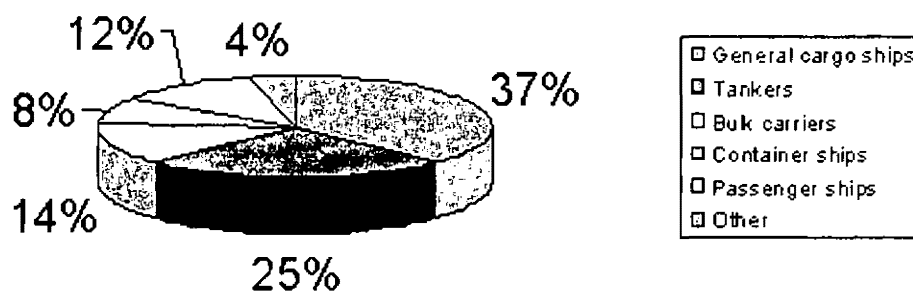
This paper aims to assess the current legal framework of pilotage in South Africa with regard to liability for pilots' actions and omissions. Since November 2006 a new legal statute, the National Ports Act, 12 of 2005, governs the law of pilotage in South Africa. This paper will examine the particular liability provisions of the National Ports Act and discuss the development of law in South Africa and in other countries, in particular the English and Australian law, in order to provide for a better understanding and assessment of the current provisions. Since English law may be directly applicable in South Africa or at least prevail as persuasive authority, as we will soon discuss, its development and current provisions on liability for pilots will be part of this paper. Australian law, on the other hand, has no direct impact on South African law but its parallels and common grounds with English and South African law regarding pilotage is of further interest.

2. Facts & figures of shipping⁶

'Without shipping the import and export of goods on the scale necessary for the modern world would not be possible.' The opening-up of markets around the world and the technological progress has accounted for a great growth in the shipping industry and the industry has not yet reached its limits but is continuing to expand. Today the shipping industry amounts to 90% of the world trade. About 50,000 merchant ships are registered in more than 150 different countries. 'Ships are technically sophisticated, high value assets (larger hi-tech vessels can cost over US \$150 million to build), and the operation of merchant ships generates an estimated annual income of over US \$380 billion in freight rates, representing about 5% of the total global economy.'

⁶ The facts, figures and diagram are provided by the Round Table of international shipping associations. Available at <http://www.marisec.org/shippingfacts/home/> [Accessed 10 January 2009].

Different sectors as percentage of total number of ships in world fleet: January 2008



Numbers of ships by sector (source: Lloyd's Register Fairplay January 2008):

18,982 general cargo ships, 6,890 bulk carriers, 4,170 container ships, 12,583 tankers, 5,957 passenger ships, 1,943 other ships → 50,525 in total.

3. Pilotage

In general, it is the ship master's duty to handle a vessel and direct its manoeuvres with accuracy and precision. He has command over the vessel and operates it with the help of his crew. Together they have the best knowledge of the vessel and its specific measures. As we have just learned a hi-tech vessel is of tremendous value and it is, therefore, necessary to have a vessel navigated by experts with the greatest care. However, the presence of a master who knows his ship and its specifics intimately is not always sufficient to provide for the greatest care. In fact, at some point of almost every voyage, it is necessary to rely on the expertise of local pilots.

(a) Pilot

The word pilot is 'applied to either a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm and the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road or channel or from or into a port'.⁷ The first definition refers to

⁷ Abbott, John Henry *Treatise of the law relative to merchant ships and seamen* Sed, at 148.

the master directing the navigation of the ship or a crew member performing his duties. Nonetheless, a pilot is traditionally called 'pilot' when the second definition applies and someone with local navigational expertise is given the task to conduct the vessel through narrow waters including the navigation of the vessel into the harbour or out to sea and during the process of berthing / unberthing and docking / undocking.⁸ A pilot in terms of section 1 of the National Ports Act, 12 of 2005 is a licensed pilot whose functions are to navigate a vessel in the port, to direct its movements and to determine and control the movements of the tugs assisting the vessel under pilotage pursuant to section 75.

Thus, when entering a harbour or a river there are local pilots with the navigational expertise of the local conditions assisting the vessel in order to ensure the safety of navigation. No master is able to acknowledge the unique conditions of port entries and rivers or, in general, specific passages of the sea worldwide. But the pilots are well trained and develop specific skills and techniques to conduct a vessel through specific areas and during all kinds of weather conditions day and night.⁹

(b) Compulsory and voluntary pilotage

Pilotage is crucial to safe navigation in shallow and narrow waters and since a master of a vessel cannot have sufficient knowledge of every local condition of ports and port entries, rivers and other specific sea passages worldwide, some areas are designated areas of compulsory pilotage. In a designated compulsory pilotage area vessels are compelled to take local pilots on board who then take over the navigation of the vessel for as long as the vessel is in such an area unless an exemption is granted by the authorities.¹⁰ For example, before entering a harbour, the harbour authority is contacted to book the movement and berthing and then a pilot climbs on board just outside the port using a special pilot ladder approved by the International Maritime Organisation and takes over the navigation of the vessel.¹¹

⁸ Francis D. Rose *The modern law of pilotage* (1984) at 1; Alexandra Mandaraka-Sheppard *Modern maritime law and risk management* 2ed (2007), at 837f.; Alex L. Parks / Edward v. Cattell JR. *The law of tug, tow, and pilotage* 4ed (1994), at 982ff.

⁹ Paul Lopinot 'Pilots and Pilotage' Ocean Hull Committee, Vessels entering and leaving the port areas 4. Available at <http://www.aimu.org/iuimipapers.html> [Accessed 10 January 2009]

¹⁰ Rose (n 8), at 22ff.; Parks / Cattell (n 8), at 1018f.

¹¹ John Hare *Shipping law and admiralty jurisdiction in South Africa* (1999), at 358.

On the contrary, voluntary pilotage means a pilot is voluntarily hired by a shipowner or master without it being an obligation by law.¹² Since almost all port areas worldwide are compulsory pilotage areas including all South African ports, voluntary pilotage plays a rather minor role in pilotage matters. Nonetheless, a master may need help navigating a vessel in unknown waters or in other special circumstances like when special deck cargo is carried which requires assistance and, therefore, a voluntary pilot may be engaged.¹³

(c) Providing pilotage services

All South African ports fall under the jurisdiction of the National Port Authority Ltd.¹⁴ According to section 11(1) of the National Ports Act, 2005, the authority's function –

is to own, manage, control and administer the ports to ensure their efficient and economic functioning, and in doing so the Authority must–

[...]

(g) regulate and control–

(i) navigation within port limits and the approaches to ports;

(ii) the entry of vessels into ports, and their stay, movements or operations in and departures from ports;

[...]

(i) exercise licensing and controlling functions in respect of port services and port facilities;

[...]

(n) provide or arrange tugs, pilot boats and other facilities and services for the navigation and berthing of vessels in the port.

They 'must, for the purpose of ensuring safety of navigation and shipping in ports– [...] provide or procure pilotage services, license pilots and regulate the safe provision of pilotage services by licensed pilots'¹⁵ who have to be certificated by the South African Maritime Safety Authority before being licensed.¹⁶ Hence, the

¹² Parks / Cattell (n 8), at 1019.; Hare (n 11) at 355.

¹³ Hare (n 11) at 355.

¹⁴ Section 10 subsection (1) of the National Ports Act 2005.

¹⁵ Section 74 subsection (1) (d) of the National Ports Act 2005.

¹⁶ Section 77 subsection (1) of the National Ports Act, 2005.

National Ports Authority Ltd. is responsible for the navigation within and around a port and they may charge fees for the provision of their services.¹⁷

II. Historical background & applicable law in South Africa

1. Historical Background

The history of pilotage in South Africa is briefly described by *Hare*.¹⁸ It has its roots in Roman-Dutch and English law. *Hare* quotes Roman Dutch writings which date back to the year 1698 and which tell us that back then pilots already had to hold certificates and when they caused damages even corporal punishment could have been considered as a consequence of their actions. Thus, the importance of pilotage services and the need for regulating these services have been discovered very early.¹⁹ The English, namely Henry VIII, started regulating pilotage in the year 1514 and the first pilotage acts were passed at the beginning of the 18th century.²⁰ Today the Pilotage Act 1987 governs pilotage in England the National Ports Act 2005 governs pilotage in South Africa.

2. Applicable law

In South Africa pilotage falls under the admiralty jurisdiction. The South African admiralty jurisdiction applies to any 'maritime claim, irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner' according to section 2 of the Admiralty Jurisdiction Regulation Act of 1983. 'Maritime claim' is defined under section 1(1) and means 'any claim for, arising out of or relating to-' and then a *numerus clausus* of matters follows, one of which is '(1) towage or pilotage'. Pilotage matters therefore fall under the jurisdiction South African admiralty and section 6 of the Admiralty Jurisdiction Regulation Act of 1983 tells us which law has to be applied to such claims.

6 *Law to be applied and rules of evidence*

¹⁷ Section 73 subsection (1) (a) (ii) of the National Ports Act, 2005.

¹⁸ *Hare* (n 11), at 351ff.

¹⁹ *Rajadurai* (n 2), at 44.

²⁰ *Hare* (n 11), at 352; *Mandaraka-Sheppard*, at 838.

(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall—

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

[...]

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.

If the English Admiralty Court had jurisdiction to decide on pilotage matters before November 1983, then English Law is applicable (subsection (1)) unless the matter is regulated by South African statute law (subsection (2)) or the parties have agreed on terms how to deal with the matter (subsection (5)). If the English Admiralty Court had no jurisdiction regarding pilotage, then Roman-Dutch law would be applicable (subsection (1)).

The English admiralty jurisdiction before November 1983 does not specifically mention pilotage, yet there are a lot of admiralty court decisions dealing with the laws of pilotage.²¹ Pilotage matters, therefore, were inherent to English admiralty jurisdiction and thus English law as it was in November 1983 is applicable in South Africa today if not covered by statute. In deed, in South Africa pilotage is also mainly regulated by statute and used to be governed by section 10 of Schedule 1 of the Legal Succession to the South African Transport Services Act, 1989, before the National Ports Act, 12 of 2005 came into effect.

²¹ See Hare (n 11) at 353f for further information and a list of cases.

III. Responsibility & Liability

We have learned that a compulsory pilot is someone navigating the vessel through narrow and shallow waters when a vessel enters or leaves a compulsory pilotage area. Initially, if the pilot caused damages while navigating the vessel, he was liable for those damages as he is responsible for his very own actions. Traditionally, pilots were also self-employed.²² The punishment for causing damages to assets of great value for which the pilot was responsible used to be very harsh as demonstrated by the quote of *Husse* in the introduction of this paper. Now it is of very little use to actually sue the pilot himself for damages done to high-value assets if the pilot clearly will not be able to meet those claims.²³ Statutory law, therefore, tends to limit or exclude the pilot's civil liability and it must be looked elsewhere to find another source to claim damages from.²⁴ Traditionally, in many countries recourse was taken with the shipowner and it '[...] appears to be that the liability of shipowners is older than the modern law of vicarious liability, and whatever its precise history, was probably based on some notion of identification of the shipowner with the vessel herself.'²⁵ On the other hand, if a pilot is employed by a third party, the employer might be held liable upon the common law principles of vicarious liability and he will also mostly be the more solvent target for claimants.

1. Description of current South African law

As we have learned pilotage in South Africa is currently governed by the National Ports Act 2005. In particular, section 76 of the National Ports Act regulates the liability of compulsory pilots and absolves the pilot from liability under certain conditions.

Liability of pilot

76 (1) Neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or her functions in terms of this Act.

²² *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 646.

²³ Chris S. Yuen 'Marine pilotage in Australia: Sydney ports case study' (2003) 17 *ANZMLJ* 80 at 91.

²⁴ Yuen (n 23) at 91.

²⁵ Patrick Selim Atiyah *Vicarious liability in the Law of Torts* (1967) at 92.

(2) Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for acts or omissions of the pilot.

Subsection (1) says that a pilot who causes damages whilst performing his functions as laid down in the National Ports Act, 2005 is not liable for those damages if he was acting in 'good faith' and neither does the harbour authority incur liability in this case. The harbour authority and the pilot himself are exempt from liability under two conditions. Firstly, the pilot needs to have acted in 'good faith' and secondly his actions must have been part of his job. It is not sufficient if the pilot has done something wrong if at the same time he was acting outside the scope of his functions. Only if the pilot was performing his functions, can section 76 be applied. More interesting is the first condition though. The pilot must act in 'good faith'. This is a very broad, undefined and general term. What does it mean? Do objective circumstances play a role, such as could a reasonable person have foreseen the danger and, therefore, avoided it? Since subsection (1) provides for the conditions under which the pilot and the harbour authority are exempt from liability, there must be a rule to this exemption. Consequently, it is presumed that the pilot and the harbour authority assume liability if the pilot caused damages by anything done or omitted in bad faith.

Subsection (2) creates a master – servant relationship between the shipowner and the compulsory pilot and additionally renders the shipowner strictly liable for the acts and omissions of the pilot.

In order to assess the provision on liability for the pilot's actions and omissions, it is necessary to examine common law and how the matter of liability was dealt with in the past more closely. It will provide for a better understanding of the shift of liability onto the shipowner.

2. Common Law

a) Vicarious liability

One of many common law principles which has been developed by court judgements is that of vicarious liability. Vicarious liability means the liability 'of a person who is not in breach of any duty incumbent on himself [... but] for torts committed by someone else'.²⁶ The wrongdoer himself remains liable, yet someone else additionally incurs liability.²⁷

Vicarious liability also requires that there is some kind of relationship between the actual tortfeasor and the one who will be held liable for the acts of the tortfeasor and there must be some connection between the actual tort and this relationship.²⁸ Since vicarious liability mostly occurs in a master – servant / employer – employee relationship, the latter condition refers to the actual tortfeasor (servant/employee) having committed the tort in 'the course of his duties/employment'.²⁹

The reasons for holding someone liable for someone else's wrongdoings are mainly based on considerations of fairness. There are several elements which if standing alone are not sufficient enough to justify vicarious liability but if all elements considered together within the special circumstances of each case, they justify holding someone liable for someone else's wrongdoing.³⁰ Employees are usually not solvent enough to satisfy a claim for damages, especially not if high value assets are involved. The employer, on the contrary, is said to have sufficient funds to meet claims (or at least his insurer) and will most likely have calculated the risk of liability and considered it when calculating the prices for his products.³¹ Furthermore, the employer is the one making profits from the employment and who is able to exercise control over the employee.³² Thus, if an employee causes damages by anything done or omitted in the course of his employment, then the employer should bear liability.³³ He is the one to whom insurance cover is accessible the easiest and the liability motivates him to create better and safer working environments to which only he has

²⁶ Tony Weir *An introduction to tort law* 2ed (2006) at 103.

²⁷ Michael A. Jones *Textbook on Torts* 8ed (2002) at 418f.

²⁸ Atiyah (n 25) at 3.

²⁹ Weir (n 26) at 104.

³⁰ Atiyah (n 25) at 15ff.

³¹ Jones (n 27) at 419., Atiyah (n 25) at 23ff.

³² George K. Geen / Richard P.A. Douglas *The law of harbours and pilotage* 3ed (1989) at 69; Weir (n 26) at 104.; Atiyah (n 25) at 16ff.

³³ Jones (n 27) at 419.

the ability.³⁴ The employer is the employee's supervisor and exercises control over his employees.³⁵ This special relationship in which the employee is the subordinate and depends on the employer is the basis for vicarious liability.³⁶

b) Liability for voluntary and compulsory pilots

In engaging a voluntary pilot the shipowner chooses and, therefore, controls the pilot. Dr. Lushington describes in *The Maria*³⁷ that 'when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owners.' Consequently, the shipowner would be the pilot's employer for the duration of the pilot's conduct of the vessel and since the shipowner is vicariously liable for the persons he employs this renders him responsible for the pilot's wrongdoings.³⁸ The shipowner who voluntarily engages a pilot is vicariously liable for the pilot's acts or omissions against which he will surely have arranged P&I cover.³⁹

Problems arise, however, if there is a pilot involved who the shipowner by law is obliged to take on board. If the compulsory pilot causes damages without contribution on part of the shipowner's crew this could possibly require apportionment of liability. The shipowner does not contract for pilotage services but is obliged to take a pilot on board who he cannot choose and has no control over and whose competence and fitness cannot be evaluated by the owner.⁴⁰ Consequently the shipowner should be absolved from liability for the pilot's acts or omissions which according to *Dr. Lushington* 'is recognized by common sense and justice'.⁴¹ He explains his reasoning further by saying –

[...] upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man-is

³⁴ Jones (n 27) at 419., Atiyah (n 25) at 16.

³⁵ Atiyah (n25) at 15f.

³⁶ Jones (n 27) at 420.

³⁷ 1 W Robinson 95 at 103.

³⁸ *Tychsen v Evans* (1880) 1 EDC 28 at 37; Brian R. Bamford *The law of shipping and carriage in South Africa* 3ed (1983) at 67, Hare (n 11) at 364; Mandaraka-Sheppard (n 8) at 847; Yuen (n 23) at 91; Rose (n 8) at 34f.

³⁹ Hare at 355f.; see also Yuen (n 23) at 91f.; Rajadurai (n 2) at 45.

⁴⁰ *Transnet Ltd t/a Portnet v The Owners of the Mv 'Stella Tingas'* (2003) 1 All SA 286 (SCA); Rajadurai (n 2) at 42.

⁴¹ *The Maria* 1 W Robinson 95 at 107.

compelled to employ another, the principle upon which liability depends wholly fails.⁴²

If a vessel was under compulsory pilotage, the shipowner could, therefore, refuse liability and rely on the so called 'compulsory pilotage defence'.⁴³

Nonetheless, this defence has been abolished by statutory law in many countries.⁴⁴ In US law, however, a shipowner may still rely on the defence of compulsory pilotage because of the reasons mentioned above.⁴⁵ Yet, the vessel itself as a legal entity may be sued by an action in rem, and then the vessel's liability stands next to the harbour authority's vicarious liability for their pilot's negligence.⁴⁶

3. English law

a) Section 15 of the 1913 Pilotage Act / Section 35 of the 1983 Pilotage Act

In England section 35 of the 1983 Pilotage Act superseding the Pilotage Act 1913 is identical with section 15 of the 1913 Act. The sections render the owner or master of a vessel under compulsory pilotage to be 'answerable' for any loss or damage caused by the vessel as if pilotage were not compulsory.⁴⁷ The sections read as follows:

Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.

Thus, the liability of a shipowner should be the same whether he voluntarily engaged a pilot or was compelled by law to take a pilot on board.⁴⁸ As we will see court decisions continuously found that hereby a master – servant relationship between the pilot and the shipowner was established rendering the shipowner vicariously liable

⁴² *The Maria* 1 W Robinson 95 at 107.

⁴³ *Gavin Weir (Master of the Fanny Breslau)* v *The Union S.S. Company* 1874 NLR 61 at 66ff.; *Table Bay Harbour Board* v *City Line, Ltd.* (1905) 22 SC 511; *John T Rennie & Sons* v *Minister of Railways and Harbours ('the Inyati')* 1913 NPD 396 at 415; Bamford (n 38) at 67, *Mandaraka-Sheppard* (n 8) at 847; *Rajadurai* (n 2) at 45f., *Hare* (n 11) at 364.

⁴⁴ The various statutory provisions will be discussed further down.

⁴⁵ *Mandaraka-Sheppard* (n 8) at 855.

⁴⁶ *Parks / Cattell* (n 8) at 1022ff.; *The Chyebassa* (1919) at 201.

⁴⁷ See Temperly for commentaries on British Shipping laws *The Merchant Shipping Acts, British Shipping Laws* Vol. 11, 7ed. (1976).

⁴⁸ *The Chyebassa* (1919) p. 201.

for the pilot's conduct.

The first of several decisions to name is *The Towerfield*.⁴⁹ On 19 October 1941 the Towerfield approached an English harbour under the conduct of a compulsory pilot and ran aground on the north side of the channel causing damages to the vessel and to harbour works. The shipowners of the Towerfield claimed damages from the harbour authority and the harbour authority counterclaimed damages from the owners.

It was found that both the compulsory pilot and the harbour authority by not determining the conditions of the channel and transmitting the information to the pilot were acting negligently and jointly caused the damages. The question then was who was to be held liable for the damages. Does 'answerable' in section 15 of the 1913 Pilotage Act refer to the shipowner being responsible for damages done *to or by* the vessel or does it refer to the shipowner being responsible only to damages done *by* the ship? It was decided that despite 'ill chosen' and 'clumsy' wording the section attributes to the shipowner liability for negligent acts or omissions of a compulsory pilot in all cases.⁵⁰ The shipowner's claim against the harbour authority for damages done to the ship, therefore, was rejected. The fact that the harbour authority contributed to the damages did not influence the decision to hold the shipowner liable for all damages caused because back then the harbour authority could claim damages by means of section 74 of the Harbours Docks and Piers Clauses Act 1847. This would not be upheld if the case were to be decided today because today the shipowner could rely on the shield of contributory negligence if the harbour authority did not maintain the safety of the harbour to which they are obliged by statutory duty.⁵¹

The same provision was analysed in *The Esso Bernicia*.⁵² On 30 December 1978 the tanker Esso Bernicia collided with mooring dolphins whereby the vessel and the dolphins were damaged while berthing at a jetty at an oil terminal in the Mainland of Shetland. Three tugs assisted the Esso Bernicia but a tow line was cast off due to a fire and the tugs lost control over the vessel which was conducted by a compulsory pilot at the time. The shipowners claimed for damages done to the jetty and damages caused by oil pollution from the shipbuilders of the tugs. The shipbuilders argued that

⁴⁹ *Workington Harbour and Dock Board v Towerfield* (1950) 2 All ER 414.

⁵⁰ *The Towerfield* (n 49) at 424ff.

⁵¹ *Mandaraka-Sheppard* (n 8) at 850f.

⁵² *Esso Petroleum Co Ltd v Hall Russel & Co Ltd (Shetland Island Council, third party)*, (1989) 1 All ER 37.

since the pilot was responsible for the incident, the shipowner bears the liability for damages done to third parties by acts and omissions of the pilot. On the other hand, the shipbuilders also asserted that the pilotage authority as the general employer of the pilot should be held liable for the damages done to the vessel under pilotage even though in *The Towerfield* it was decided that the shipowner is liable for damages caused by a negligent compulsory pilot in *all cases* and that there is no such distinction between liability for damages done *by* and those done *to* the vessel under pilotage.

It was held that it is impossible to be the servant of two different masters at the same time:

If Hall Russell's [the shipbuilder's] argument were correct, there would follow the curious result that the doctrine of *respondeat superior* would apply to two different masters in respect of two different claims of damages arising out of a single act of negligence.⁵³

A servant may be employed by a general employer and for the purpose of certain performances be considered as an employee of another but not an employee of both at the same time for the exact same performance.⁵⁴

Furthermore, the shipbuilders argued that the harbour authority should be held vicariously liable as the principal of the pilot because they were in the business of piloting ships instead of only providing the services of qualified pilots. Lord Jauncey also rejected this second argument.⁵⁵ He drew a comparison with the health sector as to the hospital being vicariously liable for the acts and omissions of the medical personnel they employ because they employ them to fulfil their very own duty to provide their patients with medical treatment and cannot, therefore, escape liability by having their personnel perform on behalf of the hospital.⁵⁶ In contrast, in the pilotage business there existed no provision obliging the harbour authority to pilot ships. Their functions were only to licence pilots, not to employ them or have them perform pilotage on the authority's behalf.⁵⁷ Lord Jauncey argued further that no authority has ever assumed a duty of managing or controlling vessels and he made reference to the Australian cases *Fowles v Eastern and Australian Steamship Co*

⁵³ *The Esso Bernicia* (n 52) at 60.

⁵⁴ *The Esso Bernicia* (n 52) at 60.

⁵⁵ *The Esso Bernicia* (n 52) at 64.

⁵⁶ *The Esso Bernicia* (n 52) at 60.

⁵⁷ *The Esso Bernicia* (n 52) at 61.

*Ltd*⁵⁸ and *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*⁵⁹, amongst others, to undermine his reasoning:

My Lords, it may be stated as a general rule that the employer of a qualified licensed pilot could never be responsible to the owner of a ship damaged by his negligence while under pilotage. All authorities support such a rule and none appear to controvert it. The basis of the rule is twofold, namely (1) the pilot is an independent professional man who navigates the ship as a principal and not a servant of his general employer and (2) s 15(1) makes him the servant of the shipowner for all purposes connected with navigation.⁶⁰

Following the case law on the interpretation of English statutory law, three rules are to be pointed out. Firstly, a shipowner is responsible for all damages caused by negligent acts or omissions of a compulsory pilot including those done to the vessel itself. Secondly, a compulsory pilot cannot be considered the servant of the harbour authority and the shipowner at the same time for the same acts or omissions and the provisions make him the shipowner's servant, and, thirdly, the harbour authority does not owe a duty of piloting vessels. They are only obliged to provide licensed pilots.

b) Section 2 and 16 of the 1987 Pilotage Act

The 1987 Pilotage Act is not very different from the former pilotage acts. Yet, it was codified that the harbour authority assumes the obligation to provide for the safety of navigating ships in compulsory pilotage areas.⁶¹ And again, according to section 16 of the act, the liability of shipowners for damages done by the ship should be the same as if the vessel was not navigated in a compulsory pilotage area. Section 16 provides:

The fact that a ship is being navigated in an area and in circumstances in which pilotage is compulsory for it, shall not affect any liability of the owner or master of the ship for any loss or damage caused by the ship or by the manner in which it is navigated.

Douglas and Geen recognise quite some important changes in the legislation and they understand section 2 as an obligation of the harbour authority to pilot ships which renders them vicariously liable for the negligent actions or omissions of the

⁵⁸ (1916) 2 AC 556

⁵⁹ (1986) 160 CLR 626.

⁶⁰ *The Esso Bernicia* (n 52) at 62ff.

⁶¹ See section 2 of the 1987 Pilotage Act.

pilots employed by them to perform their duties.⁶² They argue that section 22(3) of the 1987 Pilotage Act supports their view since this section limits the harbour authority's liability for negligent acts or omissions of employed pilots even though the 1983 Act contained a similar provision.⁶³

Nonetheless, in *The Cavendish*⁶⁴, it was, again, decided that the harbour authority does not assume the obligation to pilot ships and, therefore, cannot be held vicariously liable for the pilot's acts or omissions under compulsory pilotage. On 13 February 1990 the *Cavendish* was under compulsory pilotage approaching the river Thames when she collided with the Sunk Head Tower and/or buoy and was damaged due to the pilot's negligence. In this case it was found that a number of cases before the coming into effect of the 1987 Act supported the view that there is no such duty to pilot ships owed by the harbour authority and if the draftsmen wanted to change this ruling, then they would have done so by explicitly using 'clear and unequivocal terms'.⁶⁵

It is, however, arguable if this would still be upheld today. Even though *Mandaraka-Sheppard* agrees that there is no such obligation of piloting ships owed by the harbour authority, she submits that the harbour authority owes a duty of safe pilotage especially since the responsibility for safety of pilotage rests upon the authorities due to the Code of Port Safe Marine Operations and the Directive 1999/42/EC.⁶⁶

Nonetheless, in the *Cavendish* the plaintiffs argued further that section 16 of the 1987 Pilotage Act only applies to the liability for damages or loss suffered by third parties but not if the vessel itself was claiming damages. But again Clarke J. held that section 16 applies to liability with regard to third parties and to the shipowner's own damages and –

[...] if the draftsman had intended to make radical changes in the circumstances in which the shipowners were to be responsible for the negligence of a compulsory pilot he would have done it expressly and in clear terms. He did not.⁶⁷

⁶² Douglas / Geen (n 32) at 191.

⁶³ Douglas / Geen (n 32) at 191f.

⁶⁴ *Oceangas (Gibraltar) Ltd v Port of London Authority ('The Cavendish')* (1993) 2 Lloyd's Rep 292.

⁶⁵ *The Cavendish* (n 64) at 298.

⁶⁶ *Mandaraka-Sheppard* (n 8) at 852, 854.

⁶⁷ *The Cavendish* (n 64) at 300.

In fact, Clark J. points out that it is unlikely to have been the intention of the draftsmen to make the shipowner liable only for damages done to third parties whereas at the same time the shipowner could claim with the harbour authority for damages done to the owner's vessel because of the authority's vicarious liability for their employed pilots.⁶⁸ If this were intended, then there would be the awkward situation in which the authority would claim with the shipowner for damages done to harbour works and the shipowner could counterclaim with the harbour authority for damages done to the shipowner's vessel.⁶⁹

However, it must be noticed that Clarke J., in general, accepts the possibility of a third party being in the business of piloting ships and that the third party could, therefore, be held liable for the pilot's negligence whom they employ to perform their duty.⁷⁰ Yet, he contends that section 16 clearly establishes a master-servant relationship between such pilot and the shipowner which renders the shipowner liable for the pilot's negligence to the exclusion of the harbour authority's liability because it is impossible to serve two masters at the same time concerning the exact same performance.⁷¹

c) Concluding remarks on English Law

In English law the common law principle of vicarious liability has been altered and restricted by statutory law. Today the relevant provision in this matter is section 16 of the 1987 Pilotage Act. Section 16 was interpreted by various court decisions as to render the shipowner of a vessel under compulsory pilotage liable for all damages done by the negligence of a compulsory pilot as if the pilot were voluntarily engaged. The section is said to create a master – servant relationship between the shipowner and the compulsory pilot. The shipowner is, therefore, responsible, for the pilot's wrongdoings and cannot escape liability by relying on the principles of vicarious liability and the compulsory pilotage defence. Furthermore, the master – servant

⁶⁸ The Cavendish (n 64) at 300.

⁶⁹ The Cavendish (n 64) at 300.

⁷⁰ The Cavendish (n 64) at 300.

⁷¹ The Cavendish (n 64) at 300f.

relationship excludes the harbour authority's vicarious liability.

4. Australian Law

The Australian law is very similar to the English law. The Navigation Act 1912 governs pilotage in Australia today.

a) *Fowles Appellant v Eastern and Australian Steamship Company Ltd*

Before the Navigation Act 1912 was in force, the key questions on liability for marine pilots conducting a vessel under compulsory pilotage raised in *Fowles Appellant v Eastern and Australian Steamship Company Ltd*⁷² was whether the general employer of the pilots, the government, was in the business of piloting ships and consequently could be held vicariously liable for the pilots' wrongdoings. In other words did the government owe a duty to pilot the vessel under compulsory pilotage with due care and skill and did they employ pilots to do this for them? The pilots in Australia used to be civil servants, the government paid the pilots a salary and they charged pilotage rates.⁷³ Yet, it was found that the pilots were not the government's servants for the purpose of piloting ships.⁷⁴ The government only supplied, supervised and selected pilots but they did not undertake pilotage itself and, furthermore, the pilots must be regarded as independent professionals who pilot vessels under compulsory pilotage as principals and not as servants.⁷⁵ For the purpose of supplying pilotage services the pilots are the government's servants but 'for the purpose of navigating ships they remain what they were [...] namely independent professionals.'⁷⁶ Anything to the contrary would have been stated explicitly in the law and, consequently, the government could not be held vicariously liable even though there is some natural equity in the view 'that if you compel a master to place his ship in the hands of some one else whom you designate without consulting him you ought to make good any

⁷² (1916) 2 AC 556.

⁷³ *Fowles* (n 72) at 560.

⁷⁴ *Fowles* (n 72) at 562.

⁷⁵ *Fowles* (n 72) at 562.

⁷⁶ *Fowles* (n 72) at 562.

loss arising from his negligence' as Lord Loreburn admitted.⁷⁷

b) *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* and section 410B of the Navigation Act 1912

Then the Navigation Act 1912 came into effect and in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*⁷⁸ it was found by a 3/2 majority that section 410B of the act which deals with the liability for pilots supports the view on liability for compulsory pilots which was established in *Fowles Appellant v Eastern and Australian Steamship Company Ltd*⁷⁹.

The section reads:

410B Civil liability in relation to ship under pilotage

(1) A pilot who has the conduct of a ship is subject to the authority of the master of the ship and the master is not relieved from responsibility for the conduct and navigation of the ship by reason only of the ship being under pilotage.

(2) Despite any law of the Commonwealth or of a State or Territory, the owner or master of a ship navigating under circumstances in which pilotage is compulsory under such a law is answerable for any loss or damage caused by the ship, or by a fault of the navigation of the ship, in the same manner as the master or owner would if pilotage were not compulsory.

(3) If a pilot:

(a) does an act, issues an instruction, or provides information or advice in or in relation to the pilotage of a ship; and

(b) that act is done, that instruction is issued, or that information or advice is provided, in the course of the pilot's duty and in good faith; and

(c) that act, instruction, information or advice affects the navigation of the ship so that loss or damage is caused to or by the ship;

neither the pilot nor any pilotage provider responsible for the provision of the pilot's services is liable in civil proceedings for that loss or damage.

Subsection (2) is almost identical with section 15 of the 1913 English Pilotage Act.

Hence, there is very similar case law on the interpretation of the provision and the

⁷⁷ *Fowles* (n 72) at 561f.

⁷⁸ *Oceanic Crest* (n 22).

⁷⁹ *Fowles* (n 72).

authorities have referred to each others judgements.⁸⁰

In the *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* the vessel's collision with a dolphin in Dampier Harbour, Western Australia, which is a compulsory pilotage area, was caused due to the compulsory pilot's negligence. It was held that a compulsory pilot is a public officer whom the law charged with an independent legal duty for which he alone was responsible and the authority for his actions could, therefore, not have derived from his employment.⁸¹ Hence, the harbour authority who was found to not be in the business of piloting ships but merely in the business of supplying pilotage services could not be held vicariously liable for the pilot's actions.⁸²

Pilbara [the harbour authority] itself had no authority to engage in the piloting of ships. Its obligation to provide pilotage services as required by the Shipping and Pilotage Act 1967 was limited to the nomination to the State of persons suitably qualified to be appointed by the Governor as pilots under that Act and the employment of sufficient qualified pilots to meet the needs of the port. [...] Captain Hammonds [the pilot] did not derive his authority to navigate the "Oceanic Crest" from his employment by Pilbara, for Pilbara had no such authority. His authority as a pilot came from his appointment as such by the Governor in accordance with s. 4(b) of the Shipping and Pilotage Act 1967. It was his personal authority, and his alone.⁸³

Moreover, it was held that this view is supported by the Navigation Act 1912 because section 410B(2) renders the shipowner liable for damages as if they were caused by a voluntarily engaged pilot who is considered to be the shipowner's servant and since one servant cannot serve two masters at the same time concerning the exact same conduct, the harbour authority is excluded from vicarious liability with regard to this matter: 'In the case of a pilot, s. 410B(2) of the Navigation Act casts the liability directly on to the shipowner and in consequence excludes any liability of the general

⁸⁰ See *Esso Bernicia* (n 52) and *Oceanic Crest* (n 22).

⁸¹ *Oceanic Crest* (n 22) at 626, 637ff.; following the case *Field v Nixon* (1939) 62 C.L.R. at 675.

⁸² *Oceanic Crest* (n 22) at 626, 682f.

⁸³ *Oceanic Crest* (n 22) at 649f.

employer.⁸⁴

The strong dissenting judgements by Brennan J. and Deane J., on the contrary, challenged the view that a pilot performs an independent statutory duty rather than serves as an employee of the harbour authority while conducting a vessel. Brennan J said:

It is only when the functions of an employer are so limited by statute as to exclude the function performed by an employee in discharging his statutory responsibility that the employer is immune from liability for the employee's negligence in discharging that responsibility. But a trading corporation whose objects are advanced by the employment of servants to discharge independent statutory responsibilities and whose powers extend to the employment of servants to advance the corporate objects may be held liable on the same footing as railway companies employing constables [...].⁸⁵

Deane J additionally pointed out that other specialist employees like architects and lawyers also perform their duties as employees 'under the authority of a personal statutory license' and the employer has to rely on their knowledge and experience 'as trained and licensed experts'. Yet, the law is clear on holding the general employer vicariously liable for these employees' wrongdoings.⁸⁶

In fact, it appears to be ambivalent to absolve the harbour authority from vicarious liability by averting that the pilot ceases to be an employee of the authority for the duration of the conduct of the vessel but he becomes an independent professional performing an independent legal duty and at the same time concluding that the shipowner is the master of the pilot.⁸⁷ How can a compulsory pilot be considered an independent professional and a servant of the shipowner at the same time with regard to the exact same conduct? This anomaly was identified by Gibb CJ but he 'brushed' it away by concluding that the pilot's authority to navigate the vessel derives also from his powers given to him by the shipowner by factually handing over the

⁸⁴ *Oceanic Crest* (n 22) at 641f., 681ff.; following the findings in the *Towerfield* (n 49) in which case section 15 of the English 1913 Pilotage Act was interpreted and this section is almost identical with section 410B(2) of the Australian Navigation Act 1916.

⁸⁵ *Oceanic Crest* (n 22) at 664, with reference to *Lambert v Great Eastern Railway* (1909) 2 KB 776.

⁸⁶ *Oceanic Crest* (n 22) at 676.

⁸⁷ *Rajadurai* (n 2) at 49.

command in addition to his authority deriving from the statutory law.⁸⁸ This appears to be a rather weak argument since it is the nature of compulsory pilotage to have the pilot in command of the navigation and vesting in him the competence to pilot the vessel with the exception of legitimate interference by the master of the vessel in emergencies.⁸⁹

Brennan J also suggested that the harbour authority could be held vicariously liable in addition to the statutory liability of section 410B(2) cast upon the shipowner.⁹⁰ He said that section 410B(2) does not establish a master – servant relationship between the shipowner and the compulsory pilot and it does not give the owner the power to control the pilot's actions in favour of a master – servant relationship. In fact, the liability cast upon the owner by the statute is such liability as there was for voluntarily engaged pilots and this does not render the pilot the shipowner's servant and it, therefore, does not exclude the harbour authority's vicarious liability as the pilot's employer:

As s. 410B does not give to the owner or master of the ship any control over the pilot of the ship, that section cannot affect the vicarious liability of a pilot's general employer for negligence committed in the course of the pilot's employment. It merely creates a parallel, statutory liability in the owner or master. The owner of the ship and the general employer of the compulsory pilot are both liable to a plaintiff who suffered damages caused by the negligence of the pilot in the course of the conduct of the ship.⁹¹

However, the majority in this case held that the shipowner was liable to the exclusion of the harbour authority's liability. This interpretation of section 410B with regard to rendering the shipowner liable for the pilot's wrongdoings to the exclusion of the

⁸⁸ *Oceanic Crest* (n 22) at 642.

⁸⁹ Compare with *Yuen* (n 23) at 93f.

⁹⁰ *Oceanic Crest* (n 22) at 663ff., 673ff.

⁹¹ *Oceanic Crest* (n 22) at 670; subsection (3) absolving the pilot and the pilotage provider from liability for anything done by the pilot in good faith was inserted after the decision in *Oceanic Crest*; this exemption implies the presumption that the pilotage provider incurs liability for anything done in bad faith and consequently it is arguable to what extent it is possible for subsection (2) to render the shipowner liable to the exclusion of the pilotage provider. Subsection (3) was probably inserted on the bases of the dissenting judgements in *Oceanic Crest* and the danger of holding the pilotage authority liable in addition to the shipowner for negligent acts or omissions. The legislator decided, therefore, to explicitly absolve the pilotage provider from liability for anything done by the pilot in good faith while performing his functions.

harbour authority's liability was also upheld in the case *Port Kembla Coal Terminal Ltd v Braverus Maritie Inc*⁹² in which an unlicensed pilot had caused damages to harbour works and the ship under compulsory pilotage.

Being reluctant to overturn precedent the Australian case law is consistent in finding a compulsory pilot performing an independent statutory duty for which only the pilot is liable to the exclusion of any liability on part of the harbour authority. In addition, section 410B(2) is said to render the shipowner liable for the pilot's wrongdoings and this interpretation is mainly based on English authorities since the English statute is very similar.

5. Evaluation of South African Law

In South Africa there did not exist a provision similar to the those of the English or Australian pilotage acts concerning the relationship between the compulsory pilot and the shipowner. There were only provisions exempting the harbour administration and its servants, the pilots, from liability. Section 43 of the Act 70 of 1957 reads as follows:

43. The East London Harbour [...] and the Durban Harbour are hereby declared to be compulsory pilotage harbours [...] save and except in respect of such ships as may be exempted by statute or regulation; provided that the administration and the pilot who is a servant thereof shall be exempt from liability for any loss or damage that may arise or be caused through the act, omission or default of such pilot.

Since a compulsory pilot was considered the servant of the harbour administration, the harbour administration would bear vicarious liability for the pilots' acts and omissions. Yet, section 43 alters this principle of vicarious liability and exempts the harbour administration from liability but without creating a master – servant relationship between the pilot and the shipowner.

In the case *The Aluco* this section was examined more closely.⁹³ The shipowner's submitted that the authority may be exempt from liability concerning damages

⁹² (2004) 212 ALR 158.

⁹³ *Shell Tankers Ltd v S.A. Railways & Harbours ('The Aluco ')* (1967) (2) 666E.

caused solely by the compulsory pilot but the exemption does not go so far as to also exempt the authority from liability for damages caused by other servants of the authority in addition to the pilot's negligence. It was held, that 'the section is both an alteration of the common law and an interference with existing rights and must therefore be construed strictly and against the Administration [...]'.⁹⁴ Restrictively interpreted it was found that section 43 means the harbour administration is not exempt from liability in respect of damages done through the actions of servants other than the pilot or if other servants contributed to the damages.⁹⁵ If the draftsmen intended to exempt the harbour administration from liability in any case, then they should have stated this explicitly.⁹⁶ In the absence of an explicit statement regarding this matter, the *lex Aquilia* are applicable and every contributing wrongdoer is liable.⁹⁷ Consequently, only if the pilot's actions were the sole cause for the damages, the harbour administration, was exempt from liability.⁹⁸

a) Section 10(7) of Schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989

Section 10(7) of Schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989 is quite similar to the old exemption provision and it provides as follows:

The Company [the harbour authority] and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.

Section 10(1) further says that compulsory pilots are the employees of the harbour authority. Thus, under common law the harbour authority would bear vicarious liability for the pilots they employ but, again, the common law principle has been altered by statute and the harbour authority is exempt from liability for damages caused by the pilot's negligent acts or omissions.

There is no equivalent provision to section 16 of the English 1987 Pilotage Act in Schedule 1 to the Legal Transport Services Act, 1989 creating a master – servant

⁹⁴ The Aluco (n 93) at 671F.

⁹⁵ The Aluco (n 93) at 673E.

⁹⁶ The Aluco (n 93) at 673E.

⁹⁷ The Aluco (n 93) at 673G.

⁹⁸ The Aluco (n 93) at 674G.

relationship between the shipowner and the compulsory pilot. Such liability was still subject to common law and if the compulsory pilot caused damages because of his negligent actions without any negligent servant of the shipowner contributing towards the cause, then the shipowner could not be held liable since he was not the employer of the pilot.⁹⁹ He would still be able to rely on the compulsory pilotage defence, which was discussed earlier, and as we have learned from the *Aluco*, this shield is only lost when the pilot error was not the sole proximate cause for the damages but others contributed to it and the onus of proving that pilot error was the sole cause lies upon the harbour authority who wants to rely on the exemption of liability.¹⁰⁰

Hence, the harbour authority is exempt from liability if the damages were solely caused by the negligence of the compulsory pilot but what does negligence mean? In general, the law recognises different degrees of fault. There is intention, recklessness, gross negligence and negligence. Does the term 'negligent act or omission' in section 10(7) in Schedule 1 to the Legal Succession to the South African Transport Services Act, 1989 also include grossly negligent acts or omissions?

This question was decided in the case *The Yung Chun*¹⁰¹ in which a compulsory pilot, an employee of the harbour authority, conducted the vessel *Yung Chun* through a foggy Cape Town harbour on 24 September 1995 and the vessel then collided with an A-berth spur. The defendant averred that even if the pilot acted recklessly or grossly negligent, the harbour authority is exempt from liability because the exemption includes all degrees of negligence. Yet, it was found that the exemption clause must be construed strictly and a passage from R.H.Christie's *The Law of Contracts in South Africa*, 3rd edition, at p. 209 was quoted:

The method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted. In interpreting such clauses the court must first examine the nature of the contract in order to decide what legal grounds of liability would exist in the absence of the clause (for instance strict liability, negligence, or gross negligence), and the clause will then be given the minimum of effectiveness by being interpreted to exempt the party concerned only from the ground of liability for which he

⁹⁹ Hare (n 11) at 364.

¹⁰⁰ *The Aluco* (n 93) at 673A, 674G, 687F; see also Hare (n 11) 364f.

¹⁰¹ *Fishery Company Limited v Transnet Limited t/a Portnet ('The Yung Chun')* (2000) JOL 7386 C.

would otherwise be liable which involves the least degree of blameworthiness.¹⁰²

Reference was taken to the case of the *Aluco* which was discussed earlier and in which the exemption clause was also construed strictly.¹⁰³ Thus, it was decided 'that the interpretation of section 10(7) should be interpreted restrictively and that only the express wording of the section should provide an exemption from liability'.¹⁰⁴ The harbour authority is, therefore, only exempt from liability according to section 10(7) if the pilots employed by them act within negligence but not if they act with gross negligence or recklessness.

The meaning of negligence, gross negligence and recklessness and how to distinguish these degrees of fault was also discussed in the *Yung Chun*.¹⁰⁵ However, this distinction was of issue again in the *The Stella Tingas*¹⁰⁶ case in the year 2002 when it had to be decided on claims arising out of a collision of the *Stella Tingas* and the *Atlantica* in Durban harbour in 1997.

The court relied on findings, amongst others, made in *Philotex (Pty) Ltd and others v Snyman and others*¹⁰⁷ and *Rosenthal v Marks*¹⁰⁸ that recklessness is gross carelessness involving a risk-taking whether taken consciously or unconsciously, and that gross negligence implies 'recklessness, an entire failure to give consideration to the consequence of his actions, a total disregard of duty'. Scott J then found that risk-taking is part of negligence but being aware of the risk-taking or not does not distinguish negligence from gross negligence.¹⁰⁹ The key element is what a reasonable person would have done in the exact same situation and whether or not the behaviour 'departs so radically from the standard of the reasonable person as to amount to gross negligence'.¹¹⁰ It is necessary to also determine whether or not this extreme behaviour amounts to *dolus eventualis* as to foreseeing the risk and acting despite all reasonable means.¹¹¹ Gross negligence, therefore, is a behaviour –

¹⁰² The *Yung Chun* (n 101) at 3.

¹⁰³ The *Yung Chun* (n 101) 7; the *Aluco* (n 93) at 666E.

¹⁰⁴ The *Yung Chun* (n 101) 7.

¹⁰⁵ The *Yung Chun* (n 101) 4f.

¹⁰⁶ The *Stella Tingas* (n 40).

¹⁰⁷ (1998) (2) SA 138 (SCA) at 143C-J.

¹⁰⁸ (1944) TPD 172 at 180.

¹⁰⁹ The *Stella Tingas* (n 40) at 290.

¹¹⁰ The *Stella Tingas* (n 40) at 290; see also *S v Van Zyl* 1969 (1) SA 553 (A).

¹¹¹ The *Stella Tingas* (n 40) at 290.

[...] falling short of *dolus eventualis*, [but] must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, were there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.¹¹²

b) Liability for compulsory pilots until the coming into effect of the National Ports Act 2005

Following from the case law and its interpretations regarding section 10(7) of Schedule 1 to the Legal Succession of the South African Transport Services Act, 1989, it can be summarised that the harbour authority, who would incur vicarious liability for the negligent acts or omissions of pilots employed by them under common law, is exempt from liability in the case of negligent acts or omissions of a compulsory pilot if it were the sole cause for the loss or damage and the behaviour did not amount to gross negligence. A behaviour is regarded as grossly negligent when deviating extremely from the standard of the reasonable man. A shipowner of a vessel under compulsory pilotage could rely on the compulsory pilotage defence and would, therefore, not be responsible for any damage done by the pilot in contrast to English law where a master-servant relationship is established between the shipowner and the compulsory pilot by statute which renders the shipowner liable.

c) National Ports Act, 12 of 2005

However, there have been tremendous changes in South African statutory law. As already mentioned above the harbour authority and the pilot are no longer exempt from liability for the pilot's negligent acts or omissions but they are exempt from liability for anything done by the pilot in good faith. Moreover, the shipowner of the vessel under compulsory pilotage is strictly liable for the actions of the compulsory pilot who is deemed to be his servant.

aa) Section 76(1): 'good faith'

With the coming into effect of the National Ports Act, 2005 on 26 November 2006, the pilot and the harbour authority remain exempt from liability but the requirements

¹¹² The *Stella Tingas* (n 40) at 291.

for the exemption have changed (section 76(1)). The exemption used to be applicable if the pilot acted with negligence which did not include acts or omissions of gross negligence as we have learned earlier. In contrast, under the National Ports Act the pilot and the harbour authority are exempt if the pilot acts in good faith. In other words, it is presumed that the pilot and the harbour authority are only liable if the pilot were to act in bad faith.

What does good or bad faith mean? When does a pilot act in good faith? In general, 'good faith' is defined as 'honesty; a sincere intention to deal fairly with others', it 'is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others'.¹¹³ It can be concluded that 'good faith' regarding the liability of a pilot refers to the pilot being in a state of mind in which he believes he is doing the right thing and not endangering the vessel. He conducts the vessel without malice motives. Therefore, wilful acts of endangering the vessel under this conduct are not embraced from the exemption. What about negligent behaviour? Ordinary negligence as to carelessness it is surely not sufficient to say someone acted with malice but what about grossly negligent behaviour? As we have learned earlier, there are two types of grossly negligent behaviour, one with conscious risk-taking and one without. If someone is not aware of taking a risk, then his state of mind surely does not include malicious motives. If there is a conscious risk-taking, then this risk could have been taken because of malicious motivation but gross negligence in the case of conscious risk-taking involves a complete obtuseness of mind as was discussed earlier. Hence, there is no room for malicious motivation. Acting with gross negligence, therefore, means still acting in good faith and it can be assumed that this is exactly what the draftsmen intended when they changed the wording of section 76(1) of the National Ports Act within the drafting process. Only ordinary negligent behaviour used to be exempt as was decided in the *Stella Tingas* case. In the process of drafting the National Ports Act, the draftsmen upheld the exemption for negligent behaviour at first but then they changed the wording and replaced 'negligent acts and omissions' with 'acting in good faith'.¹¹⁴ A possible

¹¹³ See online 'Law Encyclopaedia' West's Encyclopedia of American Law, published by Thomson Gale. Available at <http://www.answers.com/topic/good-faith> [Accessed on 7 February 2009].

¹¹⁴ In the Draft National Ports Authority Bill from 11 July 2002, published in Government Gazette on 16 July 2002, No. 23633, the liability section provides for liability for negligent acts or omissions on part of the pilot. On the contrary, the National Port Authority Bill

explanation for this change is that they wanted to also absolve the pilot and the authority from liability for grossly negligent as well as for ordinary negligent behaviour.

In contrast to gross negligence, if someone acts recklessly, he is said to have foreseen the consequences, yet he acted.¹¹⁵ If someone acts despite foreseeing the consequences because he disregards them, then this should be considered malicious motivation even though the consequences are not intended. But what if he acted recklessly because he did not care about the consequences of his actions. What if he was indifferent to them? In this case there would be a neutral state of mind. Can this neutral state of mind be considered a malice state of mind because it is socio-politically undesirable to not care and let 'bad' things happen? If he foresees the consequences of his behaviour and he acts regardless of them, then he approves of them even if he does not want them to happen. As long as he is not refraining from his actions and approves the consequences, he should be considered acting in bad faith. Indeed, he did not have good faith in a positive outcome because he foresaw the consequences, yet he continued with his actions.

Still, these arguments are based on shaky grounds and a comparison with Australian Law might be interesting since the South African drafting of the exemption from liability is quite similar to the Australian legislation concerning civil liability of pilots. Section 410B(3) of the Australian Navigation Act 1912 reads as follows:

If a pilot:

- (a) does an act, issues an instruction, or provides information or advice in or in relation to the pilotage of a ship; and*
- (b) that act is done, that instruction is issued, or that information or advice is provided, in the course of the pilot's duty and in good faith; and*
- (c) that act, instruction, information or advice affects the navigation of the ship so that loss or damage is caused to or by the ship;*

neither the pilot nor any pilotage provider responsible for the provision of the pilot's services is liable in civil proceedings for that loss or damage.

from January 2003, published in Government Gazette on 17 January 2003, No. 24261, refers to liability for anything done or omitted in good faith.

¹¹⁵ The Stella Tingas (n 40) at 290.

There is no explanation or reasoning for the choice of words in this subsection and there is no definition of 'good faith' in the Navigation Act 1912. However, concerning coastal pilotage clause 7.3 of the Marine Order 54 as a regulation in terms of section 425 of the Navigation Act 1912 also refers to the pilot acting in good faith and this regulation, in fact, provides a definition of 'good faith': 'An act is considered not to have been done in good faith if it has been done recklessly and with knowledge that damage might result.'¹¹⁶ Hence, this definition supports the conclusion we have just reached regarding the interpretation of 'good faith'. However, the term remains a very vague and undefined term and it is, therefore, arguable if section 76(1) of the National Ports Act 2005 is constitutional.

bb) Section 76(2): master – servant relationship / strict liability

Changing 'negligence' to 'good faith' was not the only change of the liability provisions which the legislators implemented. Subsection 76(2) additionally establishes a master – servant relationship between the compulsory pilot and the shipowner of the vessel under compulsory pilotage. With regard to English statutory law and its interpretation, this could suggest an alteration of the common law principle of vicarious liability and the harbour authority as the general employer could no longer be considered responsible for the acts or omissions of their employees because their employees are considered to be the servants of the shipowner for the duration of the conduct. Under the South African National Ports Act the shipowner is not only deemed to be the pilot's master he is also strictly liable for damages caused by the pilot's acts or omissions. The question is whether or not this subsection excludes the vicarious liability of the harbour authority as was decided and continuously applied in English case law?

d) Reasoning behind changes in legislation

aa) Explicit liability on part of the shipowner as remedy for harbour authority and third parties

Why does the statute establish a master – servant relationship between the pilot and the shipowner if the pilot and the harbour authority are exempt from liability

¹¹⁶ Footnote number 4 of clause 7.3 of the Marine Order 54, order number 6 of 2001.

anyhow? There is no exemption if there is not a rule to the exemption. Since the pilot and the harbour authority are only exempt from liability if the pilot causes damages while performing his functions in good faith, it can be presumed that the pilot and the authority would be held liable if the pilot acted in bad faith. Maybe subsection (2) has, therefore, the purpose of absolving the authority from any liability which could possibly occur. Furthermore, by rendering the shipowner strictly liable and deeming him the master of the pilot, this provides the harbour authority with the possibility of claiming with the shipowner for damages done to harbour property. Now this appears to be a very good explanation for the establishment of such a relationship. It might also be desirable to have someone liable for damages done to third parties. Since there was no provision similar to the English and Australian provisions rendering the shipowner liable for the pilot's wrongdoings until the coming into effect of the National Ports Act, there was a gap for recovering the costs for damages and loss suffered not only by the harbour authority and the shipowner of the vessel under compulsory pilotage but also by innocent third parties.¹¹⁷ Third parties appear to have been the biggest 'losers' because they had no involvement whatsoever with the owner of the vessel which caused the damages or with the pilot who conducted the vessel or the harbour authority who employed the pilot, yet, they suffered damages and because they are less likely to be insured against such damages they were left without compensation either because the pilot did not have sufficient assets to compensate them or because he was absolved from liability.¹¹⁸ Now since the shipowner is strictly liable for damages, there is also a remedy for third parties and the harbour authority with respect to damages caused to harbour installations. Additionally, in the event of environmental pollution the clean up costs would not unnecessarily burden the funds.

As we have learned the shipowner's burden with liability for a pilot's wrongdoings 'was probably based on some notion of identification of the shipowner with the vessel herself'.¹¹⁹ This explains, amongst other reasons, why the court decisions were not reluctant to render the shipowner liable for actions of a compulsory pilot whom he was compelled by law to take on board. Since the interpretation of such provisions gave rise to many court decisions, it can be assumed that the South African legislator wanted to explicitly render the shipowner liable without leaving any doubt even

¹¹⁷ Hare (n 11) at 364.

¹¹⁸ Rajadurai (n 2) at 62; *Oceanic Crest* (n 22) at 677

¹¹⁹ Atiyah (n 25) at 92.

though in the past there was no provision similar to those under English and Australian law which could have caused similar discussions.

bb) In the business of piloting ships

However, under English law there is no provision explicitly absolving the harbour authority from liability and there used to not be one in Australian law either. Hence, because of the developments in modern pilotage going so far as to finding that pilotage providers are actually in the business of piloting ships and they, therefore, should incur vicarious liability for the persons they employ to fulfil their duty, the draftsmen might have seen the need to explicitly render the shipowner liable and deeming him the master of the pilot to the exclusion of vicarious liability on part of the harbour authority in order to avoid any possible discussions similar to those concerning the English and Australian law. This discussion certainly would also have occurred in South Africa since it is submitted that the harbour authority is in the business of piloting vessels and, therefore, responsible for the actions of the persons they employ to perform their duty.

This view is supported by the case *The Sea Empress*¹²⁰ in which the harbour authority pleaded guilty for causing pollution due to the grounding of the vessel caused by pilot error. The harbour authority only pleaded guilty because of a criminal offence they were charged with and could not escape. They did not admit any vicarious liability for the pilot's conduct. Yet, this indicates, that today pilotage providers are actually in the business of piloting vessels rather than only supplying pilotage services.¹²¹ Why should the harbour authority be responsible for oil pollution resulting from pilot error by means of a criminal offence if at the same time they are not responsible for the same acts of such pilot resulting in damages suffered by the vessel or harbour installations? There is no consistency regarding this matter of responsibility for pilots' actions but it seems rather that the responsibility varies depending on whatever policy reasons are favoured with regard to the kind of damages which resulted from those actions. According to section 11 (1) of the National Ports Act –

[t]he main function of the Authority is to own, manage, control, and administer

¹²⁰ *R v Milford Haven Port Authority ('The Sea Empress')* (2000) Env. L.R. 632 CA (CD).

¹²¹ Rajadurai (n 2) at 56.

ports to ensure their efficient and economic functioning, and in doing so the Authority must –

[...]

(g) regulate and control –

(i) navigation within port limits and the approaches to ports [...].

This provides further support for the view that the harbour authority is in the business of piloting ships. They do not only provide pilotage services but they are in charge of the navigation.

In any case, the legislator decided to alter common law and shift liability onto the shipowner for various reasons and in doing so, they choose explicit wording creating a statutory strict liability and a master – servant relationship between the owner and the compulsory pilot in order to avoid any doubts about the owner's liability for pilots.

cc) Concurrent liability on part of the shipowner, pilot and harbour authority

On the other hand, if the shipowner is strictly liable for the pilot's acts and he is deemed to be the pilot's master, how could there be any room for liability on the part of the harbour authority provided that English and Australian case law is followed excluding the authority's liability based on the principle that a servant cannot serve two masters at the same time regarding the same actions? Hence, there is no need to exempt the harbour authority from liability if the authority does not incur liability due to the shipowner being the master of the pilot and the principle that a servant cannot serve two masters at the same time concerning the same performance. Why, therefore, have the authority additionally exempt from liability?

Maybe it was sought to avoid any liability that could possibly occur in the future even though I cannot think of an event in which the authority would possibly incur liability unless it is submitted that the establishment of a master – servant relationship in subsection (2) does not exclude the harbour authority from a concurrent vicarious liability for the pilots' acts and omissions if done in bad faith.

As we know from the court decisions in the *Aluco* and the *Yung Chun*, exemption clauses should be construed strictly which means they should state explicitly what is exempt. If an exemption of a), b) and c) is aimed at, then a), b) and c) should be mentioned explicitly. It is not sufficient to state a) and b) and then only impliedly

recognise the exemption of c). From this it can be concluded that it is quite certain that section 76 of the National Ports Act only aims at exempting the pilot and the harbour authority from liability for damages or loss caused by anything done or omitted by the pilot in good faith while performing his functions. If the pilot acted in bad faith, he and the harbour authority are not exempt from liability. Otherwise the section should have left the wording 'good faith' away exempting the authority and the pilot from liability with regard to all of the pilot's actions whether or not done or omitted in good or bad faith.

With regard to this it can, therefore, further be concluded that section 76(2) does not overrule section 76(1). Section 76(2) establishes a master – servant relationship between the shipowner and the pilot. The pilot is 'deemed' to be the owner's servant. This could be regarded as a statutory alteration of the principle that a servant cannot serve two masters at the same time instead of regarding it as an alteration of the principle of vicarious liability to the exclusion of the general employer's liability as was found in English and Australian case law. In fact, the English and Australian case law does not discuss this interpretation of statutory law. On the other hand, the English and Australian law did not have a provision explicitly absolving the pilot and the harbour authority from liability. The wish for excluding this liability for policy reasons and shifting it onto the shipowner could have, therefore, forced the courts to conclude that a master – servant relationship between the shipowner and the pilot was impliedly established by law and excluded the pilot's and the harbour authority's liability. It was a given fact, that the pilot and the authority should be absolved from liability as far as possible for various reasons already mentioned and since the statute did not provide for such a provision, the courts had to interpret the existing provisions with regard to this objective.

This view is supported by the fact that Australian statute law was supplemented with the provision of absolving the pilot and the pilotage provider from liability for anything done by the pilot in good faith according to section 410B(3) of the Navigation Act 1912. If section 410B(2) of that act indubitable rendered the shipowner liable to the exclusion of the pilot and the pilotage provider, then there would not have been a need to insert another subsection. The explanatory memorandum to the Maritime Legislation Amendment Bill 2005 which changed the section reads:

Item 101 also inserts a new subsection 410B(3) to make it clear that neither the pilot nor the pilot's pilotage provider is liable for civil damage that may result in connection with a ship while a ship is under pilotage. Pilot immunity from civil liability claims is a longstanding convention and is necessary because of the inability of pilots to insure themselves against potential liabilities.¹²²

As was mentioned earlier the dissenting judgements in the *Oceanic Crest*¹²³ must have given rise for some clarification on that issue. This explanation appears to conclude that there is no liability at all on part of the pilot and its provider and this is supported by the commentaries of different lawyers who say that the Navigation Act exempts pilots from all civil liability rather than limiting it or, in general, just refer to no civil liability on the part of the pilot and its provider.¹²⁴ They do not conclude that liability is only excluded if the pilot acted in good faith and that this must leave the presumption that the pilot and the authority, indeed, are liable if the pilot acted in bad faith. Consequently, by inserting section 410B(3) the legislator only clarified that there is does not exist concurrent liability on part of the pilot or its provider regarding anything done by the pilot in good faith but it even supports the view that there, indeed, is concurrent liability on part of the pilot and its provider in the event of bad faith.

Likewise, this is submitted to be the case in South African law. It is submitted that section 76(2) of the National Ports Act does not overrule section 76(1) and that section 76(1) clarifies that the pilot and the harbour authority are absolved from liability if the pilot acts in good faith but that the pilot and the authority are liable if the pilot acted in bad faith in addition to the strict liability of the shipowner established in section 76(2). In this respect it is further submitted that the establishment of a master – servant relationship between the shipowner and the pilot

¹²² 'Explanatory Memorandum to the Maritime Legislation Amendment Bill 2005' at 36. Available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/CF0976D2C61AE308CA25702D00064424/\\$file/05124EM.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/CF0976D2C61AE308CA25702D00064424/$file/05124EM.pdf). [Accessed 20 January 2009].

¹²³ *Oceanic Crest* (n 22).

¹²⁴ Matthew Brooks / Alanna Vivian from Ebsworth & Ebsworth Lawyers 'Maritime Law Bulletin' December 2007, at 6. Available at http://www.hwlebsworth.com.au/files/EBSWORTH_Pubs/Maritime/Maritime_Dec07.pdf. [Accessed 10 February 2009]; Eranest van Buuren / Vaishi Rajanayagam from Blake Dawson Waldron Lawyers 'Trade & Transport Alert' April 2006. Available at http://www.afif.asn.au/pdf/news/Apr06_BDWTradeandTransportAlert.pdf. [Accessed 10 February 2009].

in section 76(2) does not exclude the harbour authority's vicarious liability on the bases of the principle that a servant cannot serve two masters but that section 76 rather alters this principle and establishes a concurrent liability of the shipowner and the harbour authority provided that the pilot acted in bad faith.

IV. Final remarks

In South African law the objective of rendering the shipowner liable for a compulsory pilot's misconduct like it was part of English and Australian law did not exist. In South Africa the objective was simply to absolve the pilot and the harbour authority from liability. As mentioned earlier, traditionally, the pilot himself did not have sufficient funds to meet claims and insurance was not available to him and the government who supplied compulsory pilots did not want to be held liable for actions from which they did not gain profit, but which merely served public interests and overall the interests of the shipowners. However, with the coming into effect of the National Ports Act, the legislator introduced the shipowner's liability for the pilot's misconduct. Section 76(2) explicitly established a strict liability on part of the ship owner. This does not leave any room for discussions like in English or Australian law and this is exactly what was aimed at when drafting the provision. Moreover, the legislator wanted to make clear that next to the shipowner's liability stands no parallel liability on part of the pilot or the harbour authority provided the pilot acted in good faith (section 76(1)). It is submitted that, on the contrary, if the pilot acted in bad faith, a parallel liability on part of the pilot and the harbour authority is established and it is done rightly so because a pilot who acts in bad faith does not deserve any protection from liability for his actions. Furthermore, this serves the interests of innocent third parties even though the concurrent liability does not occur in general, but only in the event that the pilot acted in bad faith.

BIBLIOGRAPHY

I. Primary sources

Table of cases

- *Esso Petroleum Co Ltd v Hall Russel & Co Ltd (Shetland Island Council, third party)*, (1989) 1 All ER 37
- *Field v Nixon* (1939) 62 C.L.R.
- *Fishery Company Limited v Transnet Limited t/a Portnet* (2000) JOL 7386 C
- *Fowles Appellant v Eastern and Australian Steamship Company Ltd* (1916) 2 AC 556
- *Gavin Weir (Master of the Fanny Breslauer) v The Union S.S. Company* 1874 NLR 61
- *John T Rennie & Sons v Minister of Railways and Harbours* 1913 NPD 396
- *Lambert v Great Eastern Railway* (1909) 2 KB 776
- *Oceangas (Gibraltar) Ltd v Port of London Authority* (1993) 2 Lloyd's Rep 292
- *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 646
- *Philotex (Pty) Ltd and others v Snyman and others* (1998) (2) SA 138 (SCA)
- *Port Kembla Coal Terminal Ltd v Braverus Maritie Inc* (2004) 212 ALR 158
- *R v Milford Haven Port Authority* (2000) Env. L.R. 632 CA (CD)
- *Rosenthal v Marks* (1944) TPD 172
- *S v Van Zyl* 1969 (1) SA 553 (A)
- *Shell Tankers Ltd v S.A. Railways & Harbours* (1967) (2) 666E
- *Table Bay Harbour Board v City Line, Ltd.* (1905) 22 SC 511
- *The Chyebassa* (1919) at 201
- *The Maria* 1 W Robinson 95
- *Transnet Ltd t/a Portnet v The Owners of the Mv 'Stella Tingas'* (2003) 1 All SA 286 (SCA)
- *Tychsen v Evans* (1880) 1 EDC 28
- *Workington Harbour and Dock Board v Towerfield* (1950) 2 All ER 414

Table of statutes

- Admiralty Jurisdiction Regulation Act of 1983
- National Ports Act 12 of 2005
- Navigation Act 1912 (AU)
- Pilotage Act of 1913 (UK)
- Pilotage Act of 1983 (UK)
- Pilotage Act of 1987 (UK)
- Schedule 1 of the Legal Succession to the South African Transport Services Act 9 of 1989

II. Secondary sources

- Abbott, John Henry *Treatise of the law relative to merchant ships and seamen* 5ed (1827)
- Atiyah, Patrick Selim *Vicarious liability in the Law of Torts* (1967) Butterworths, London
- Bamford, Brian R. *The law of shipping and carriage in South Africa* 3ed (1983) Juta, Cape Town
- Brooks, Matthew / Vivian, Alanna, Ebsworth & Ebsworth Lawyers 'Maritime Law Bulletin' December 2007
- Buuren, Earnest van / Rajanayagam, Vaishi, Blake Dawson Waldron Lawyers 'Trade & Transport Alert' April 2006
- Christie, R.H. *The law of contracts in South Africa*, 3ed (1996) Butterworths, Durban
- Douglas, Richard P.A. / Geen, George K. *The law of harbours and pilotage* 3ed (1989) Lloyd's of London Press., London
- Hare, John *Shipping law and admiralty jurisdiction in South Africa* (1999) Juta, South Africa
- Jones, Michael A. *Textbook on Torts* 8ed (2002) Oxford Univ. Press, Oxford
- Mandaraka-Sheppard, Alexandra *Modern maritime law and risk management* 2ed (2007) Routledge – Cavendish, London
- Parks, Alex L. / Cattell Jr., Edward V. *The law of tug, tow, and pilotage* 4ed (1994) Cornell Maritime Press

- Rajadurai, Ambrose 'Vicarious liability for negligent pilotage in Victoria' (2002) 16 ANZMLJ 39
- Rose, Francis D. *The modern law of pilotage* (1984) Sweet & Maxwell, London
- Temperley, Robert, *The Merchant Shipping Acts* British Shipping Laws, Vol. 11, 7ed (1976) Stevens, London
- Weir, Tony *An introduction to tort law* 2ed (2006) Oxford Univ. Press, Oxford
- Yuen, Chris S. 'Marine pilotage in Australia: Sydney ports case study' (2003) 17 ANZMLJ 80

- Draft National Ports Authority Bill from 11 July 2002 published in Government Gazette on 16 July 2002, No. 23633
- Explanatory Memorandum to the Maritime Legislation Amendment Bill 2005
- National Port Authority Bill from January 2003, published in Government Gazette on 17 January 2003, No. 24261